

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[OAR-2004-0076; FRL-]

[RIN]

**Final Determination to Extend Deadline for Promulgation of
Action on Section 126 Petition From North Carolina**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: The EPA is extending by six additional months the deadline for taking final action on a petition submitted by the State of North Carolina under section 126 of the Clean Air Act (CAA). The petition requests that EPA make findings that certain sources located in 13 States are significantly contributing to fine particulate matter and/or 8-hour ozone nonattainment or maintenance problems in North Carolina. Under the CAA, EPA is authorized to grant this time extension if EPA determines that the extension is necessary, among other things, to meet the purposes of the CAA's rulemaking requirements. By this document, EPA is making that determination.

EFFECTIVE DATE: This action is effective on **[INSERT SIGNATURE DATE]**.

ADDRESSES: The EPA has established a docket for the action

on North Carolina's section 126 petition under Docket ID No. OAR-2004-0076. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Air Docket is (202) 566-1742.

You may access this Federal Register document electronically through the EPA Internet under the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>.

FOR FURTHER INFORMATION CONTACT: For general information and policy questions, contact Carla Oldham, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Strategies and Standards Division, C539-02, Research Triangle Park, NC, 27711, telephone (919) 541-3347, e-mail

at oldham.carla@epa.gov. For legal questions contact Howard J. Hoffman, U.S. EPA, Office of General Counsel, Mail Code 2344A, 1200 Pennsylvania Avenue, NW, Washington, DC, 20460, telephone (202) 564-5582, e-mail at hoffman.howard@epa.gov.

SUPPLEMENTARY INFORMATION: Today's action is procedural and is set in the context of a separate action that EPA is taking to address the problem of interstate transport of fine particulate matter and 8-hour ozone and their precursors in the eastern half of the United States.

On January 30, 2004 (69 FR 4566), EPA proposed the "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule)," now known as the Clean Air Interstate Rule. This action proposes to require 29 States and the District of Columbia to revise their State implementation plans (SIPs) to include control measures to reduce specified amounts of emissions of sulfur dioxide (SO₂) and/or nitrogen oxides (NO_x). The proposal is designed to assure that the SIPs meet the requirements of CAA section 110(a)(2)(D), which mandates that SIPs contain adequate provisions prohibiting emissions that contribute significantly to nonattainment problems in downwind States. Controlling the pollution transport will assist the downwind States in achieving the fine particulate matter and 8-hour ozone national ambient air quality standards.

On March 19, 2004, EPA received a petition from the State of North Carolina filed under CAA section 126. Section 126 is related to section 110(a)(2)(D) and is also designed to remedy interstate pollution transport. Section 126(b) authorizes States or political subdivisions to petition EPA for a finding that major stationary sources or groups of sources in upwind States emit in violation of the prohibition of section 110(a)(2)(D), by contributing significantly to nonattainment problems in downwind States. If EPA makes such a finding, EPA is authorized to establish Federal emissions limits for the affected sources.

Under section 126(b), EPA must make the finding requested in the North Carolina petition, or deny the petition, within 60 days of the March 19, 2004 receipt of the petition. Under section 126(c), any existing sources for which EPA makes the requested finding must cease operations within 3 months of the finding, except that those sources may continue to operate if they comply with emission limitations and compliance schedules that EPA may provide to bring about compliance with the applicable requirements.

Section 126(b) further provides that EPA must allow a public hearing for the petition. In addition, EPA's action under section 126 is subject to the procedural requirements of CAA section 307(d). See section 307(d)(1)(N). One of

these requirements is notice-and-comment rulemaking, under section 307(d)(3).

In addition, section 307(d)(10) provides for a time extension, under certain circumstances, for rulemaking subject to section 307(d). Specifically, section 307(d)(10) provides:

Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of the subsection.

Section 307(d)(10) applies to section 126 rulemakings because the 60-day time limit under section 126(b) necessarily limits the period after proposal to less than 6 months.

In accordance with section 307(d)(10), EPA is today determining that the 60-day period afforded by section 126(b) is not adequate to allow the public and the Agency adequate opportunity to carry out the purposes of section 307(b). Specifically, the 60-day period is not sufficient for EPA to develop an adequate proposal on whether the sources identified in the section 126 petition contribute significantly to nonattainment problems downwind, and, further, to allow public input into the promulgation of any controls to mitigate or eliminate those contributions.

The determination whether upwind emissions contribute significantly to downwind nonattainment areas is highly complex. The proposed Clean Air Interstate Rule, which proposes a somewhat comparable determination, relies on extensive computer modeling of air quality emissions and ambient impacts therefrom in the large geographic region of the eastern half of the United States.

In action on the section 126 petition, EPA must make determinations that, generally, are at least as complex as those required for the Clean Air Interstate Rule. Moreover, if EPA determines that the petitions should be granted, EPA would promulgate appropriate controls for the affected sources.

The EPA is in the process of determining what would be an appropriate schedule for action on the section 126 petition, in light of the complexity of the required determinations and the usefulness of coordinating generally with the procedural path for the Clean Air Interstate Rule. It is imperative that this schedule afford EPA adequate time to prepare a proposal that clearly elucidates the issues so as to facilitate public comments, as well as to afford the public adequate time to comment. The EPA is currently discussing an appropriate schedule with North Carolina.

Extending the date for action on the section 126

petition for 6 months is necessary to determine the appropriate overall schedule for action, as well as to continue to develop the technical analysis needed to develop a proposal.

II. Final Action

A. Rule

Today, EPA is determining, under CAA section 307(d)(10), that a 6-month period is needed to assure the development of an appropriate schedule for rulemaking on the North Carolina section 126 petition, which schedule would allow EPA adequate time to prepare a notice of proposed rulemaking that will best facilitate public comment, as well as allow the public sufficient time to comment. Accordingly, EPA is granting a 6-month extension to the time for rulemaking on the North Carolina section 126 petition. Under this extension, the date for action on the petition is November 18, 2004.

B. Notice-and-Comment Under the Administrative Procedures Act (APA)

This document is a final agency action, but may not be subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553(b). The EPA believes that because of the limited time provided to make a determination that the deadline for action on the section 126 petition should be extended,

Congress may not have intended such a determination to be subject to notice-and-comment rulemaking. However, to the extent that this determination is subject to notice-and-comment rulemaking, EPA evokes the good cause exception pursuant to the EPA, 5 U.S.C. 553(b)(3)(B). Providing for notice-and-comment would be impracticable because of the limited time provided for making this determination, and would be contrary to the public interest because it would divert Agency resources from the critical substantive review of the section 126 petition.

C. Effective Date Under the APA

Today's action is effective on **[INSERT SIGNATURE DATE]**. Under the APA, 5 U.S.C.(d)(3), agency rulemaking may take effect before 30 days after the date of publication in the Federal Register if the agency has good cause to mandate an earlier effective date. Today's action--a deadline extension--must take effect immediately because its purpose is to extend by 6 months the deadline for action on the petition. Moreover, EPA intends to use immediately the 6-month extension period to continue to develop an appropriate schedule for the ultimate action on the section 126 petition and to continue to develop the technical analysis needed for the notice of proposed rulemaking. These reasons support an effective date prior to 30 days after publication.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The OMB has exempted this regulatory action from Executive Order 12866 review. Accordingly, Executive Order 12866 does not apply to today's action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Today's rule does not create new requirements and is not subject to the Paperwork Reduction Act.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA or any other statute. This rule is not subject to

notice-and-comment requirements under the APA or any other statute because although the rule is subject to the APA, the Agency has invoked the "good cause" exemption under 5 USC 553(b), therefore it is not subject to the notice-and-comment requirement.

Although this final rule is not subject to the RFA, EPA nonetheless has assessed the potential impact on small entities subject to the rule. Today's rule does not create new requirements for small entities or other sources.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rules with "Federal mandates" that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year.

The EPA has determined that these requirements do not apply to today's action because today's rulemaking is not a Federal mandate--rather, it simply extends the date for EPA

to take action on a petition--and it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Today's action does not have federalism implications. It imposes no regulatory burdens. Thus, the requirements of section 6 of the Executive Order do not apply to this rulemaking action.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable

process to ensure “meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.” “Policies that have Tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This rule does not have Tribal implications. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes, as specified in Executive Order 13175. Today's action does not significantly or uniquely affect the communities of Indian Tribal governments. As discussed above, today's action imposes no new requirements that would impose compliance burdens. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

Executive Order 13045: “Protection of Children from Environmental Health and Safety Risks” (62 FR 19885, April

23, 1997) applies to any rule that (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it simply extends the deadline for EPA to take action on a petition and does not impose any regulatory requirements.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, “Actions That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355; May 22, 2001) because it is not a significant regulatory action under Executive Order 12866. Today’s action does not establish any new regulatory requirements.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (“NTTAA,” Public Law 104-113 section

12(d) 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities that establish technical standards, unless to do so would be inconsistent with applicable law or otherwise impractical.

The NTTAA does not apply because today's action does not establish any new technical standards.

J. Congressional Review Act

The Congressional Review Act (CRA), 5 U.S.C. §801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 of the CRA provides an exception to this requirement. For any rule for which an agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest, the rule may take effect on the date set by the Agency. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. §804(2).

K. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

Under CAA section 307(b)(1), a petition to review today's action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days of **[INSERT SIGNATURE DATE]**.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Emissions trading, Intergovernmental relations, Nitrogen oxides, Ozone, Ozone transport, Reporting and recordkeeping requirements.

Dated:

Michael O. Leavitt
Administrator